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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 380

RAFAEL H. LOPEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 356 F. 2d 986.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1966. A petition for rehearing was denied on April 27, 1966. The petition for a writ of certiorari was filed on July 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review a deportation order some two and one-half years after it had become final.

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2. Whether the special inquiry officer abused his discretion in denying petitioner's motion to reopen the deportation proceedings.

STATUTE INVOLVED

Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a) provides in pertinent part as follows:

> (a) Exclusiveness of procedure.
>
> The procedure prescribed by, and all the provisions of sections 1031–1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—
>
> Time for filing petition.
>
> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

STATEMENT

Petitioner, a native of the Philippines, entered the United States on August 26, 1958, as a non-immigrant exchange visitor (R. 70, 80).[1] He was authorized to remain in the United States in such status until July 30, 1962 (R. 70–71, 80). On April 30, 1962, Congressman Francis E. Walter introduced a private bill

[1] "R." references are to the certified administrative record, which the government is having forwarded to the Clerk of this Court from the court of appeals.

(H.R. 11505) in Congress to grant petitioner permanent residence in the United States. 108 Cong. Rec. 7312. On May 8, 1962, during an interview at the local Immigration and Naturalization Service office, petitioner, upon advice of counsel, applied for a waiver of the foreign-residence requirement of Section 212(e) of the Immigration and Nationality Act (8 U.S.C. 1182(e)), thereby terminating his non-immigrant exchange visitor status (8 C.F.R. 214.2(j)). Section 212(e) provides that an alien admitted as a non-immigrant exchange visitor is ineligible for permanent residence unless he has resided abroad for two years following expiration of his exchange-visitor visa. This requirement may, however, be waived on grounds of hardship by the Attorney General. Petitioner's application for a waiver was denied on June 15, 1962.

On June 27, 1962, the Service initiated deportation proceedings by issuing an order to show cause charging that petitioner had terminated his exchange visitor status by applying for waiver of the foreign-residence requirement of Section 212(e) (R. 80). A hearing was held on July 17, 1962, at which petitioner was represented by counsel (R. 69). Petitioner and his counsel conceded the truth of the factual allegations set forth in the order to show cause (R. 70–71). The special inquiry officer found petitioner subject to deportation under Section 241(a)(9) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(9)) for failure to maintain status and granted him permission to depart voluntarily from the United States in lieu of deportation (R. 62–67).

In the event petitioner failed to depart voluntarily, the order provided for involuntary departure (R. 67). No appeal was taken.

The private bill introduced in Congress in petitioner's behalf failed to pass by the end of the session. Congressman Walter introduced another private bill (H.R. 1562) for similar relief on January 9, 1963. 109 Cong. Rec. 66. This bill also failed to pass.

When petitioner did not voluntarily depart, a warrant of deportation was issued on October 12, 1964 (R. 61). Petitioner acquired new counsel who petitioned to reopen the original deportation proceedings on January 6, 1965—approximately two and one-half years after entry of the order (R. 52–54). Petitioner alleged that he had been coerced into filing the waiver application by misrepresentations and threats of the immigration officer (R. 55–60).

The special inquiry officer denied the motion to reopen. He ruled that, since the evidence was available at the time of the original hearing, the applicable regulation (8 C.F.R. 242.22) precluded reopening (R. 46–49). A motion for reconsideration of the adverse ruling was denied on February 5, 1965 (R. 21–23). On May 14, 1965, the Board of Immigration Appeals agreed that reopening the deportation proceeding was not warranted in this case and dismissed the appeal (R. 2–6).

A petition in the court of appeals was filed on July 25, 1965. The court of appeals made two separate determinations (Pet. App. 12–13; 356 F. 2d 986): (1) that it lacked jurisdiction to review the original deportation order entered in July 1962; (2) that al-

though it had jurisdiction to review the denial of the motion to reopen on the merits, the special inquiry officer had not abused his discretion in refusing to reopen the proceedings.

ARGUMENT

1. Petitioner argues, in effect, that he may avoid the statutory six-month time limit for seeking judicial review of his final order of deportation[2] by the simple expedient of filing a motion to reopen, for which there is no time limitation (8 C.F.R. 242.22). The statutory language and legislative history are to the contrary. The statute provides expressly that judicial review of final deportation orders may not be had after six months. 8 U.S.C. 1105a(a)(1); see *Liadakis* v. *Immigration and Naturalization Service*, 339 F. 2d 447 (C.A. 4); *Kassab* v. *Immigration and Naturalization Service*, 322 F. 2d 824 (C.A. 9). Congress intended to eliminate the possibility of a deportable alien waiting, as in this case, until physical deportation is imminent—years after the deportation proceeding has been concluded—before seeking review in the courts of appeals. H. Rep. No. 1086, 87th Cong., 1st Sess., 1961 U.S. Code Cong. & Admin. News 2950, 2973–2974.[3] That an alien may at any time

[2] The deportation order became final when no appeal was taken to the Board of Immigration Appeals. 8 C.F.R. 243.1; see *Kladis* v. *Immigration and Naturalization Service*, 343 F. 2d 513, 514 (C.A. 7).

[3] To be sure, an alien in custody pursuant to an order of deportation may at any time seek judicial review thereof by habeas corpus. 8 U.S.C. 1105a(a)(9). But petitioner was not in custody. And had he been, review on habeas corpus could still have been denied since he failed to exhaust his administrative remedies by timely appeal to the Board of Im-

move to reopen the proceeding does not give the court of appeals jurisdiction to review the original order more than six months after it has become final. *Chul Hi Kim* v. *Immigration and Naturalization Service*, 357 F. 2d 904, 906 (C.A. 7).

2. The court of appeals correctly held that it had jurisdiction to review denial of the motion to reopen, since review was sought within six months of the final administrative denial. *Giova* v. *Rosenberg*, 379 U.S. 18; *Toon-Ming Wong* v. *Immigration and Naturalization Service*, decided July 18, 1966; *Chul Hi Kim* v. *Immigration and Naturalization Service*, 357 F. 2d 904 (C.A. 7). The court's conclusion that the special inquiry officer had not abused his discretion in denying the motion was also, we submit, correct. A motion to reopen may not be granted unless the special inquiry officer is satisfied that the evidence sought to be offered is (1) material and (2) was not available and could not have been discovered or presented at the hearing. 8 C.F.R. 242.22. Petitioner was well aware at the time of the deportation hearing of the circumstances surrounding his application for a waiver of foreign residence; his belated allegations of misconduct on the part of the Immigration Service officer at the time of that application do not present an occasion for reopening the proceeding.

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migration Appeals. See 8 U.S.C. 1105a(c); *Kladis* v. *Immigration and Naturalization Service*, 343 F. 2d 513, 514–515 (C.A. 7); *Kassab* v. *Immigration and Naturalization Service*, 322 F. 2d 824, 826 (C.A. 9); *Application of Argyros*, 245 F. Supp. 190 (S.D.N.Y.); *Varga* v. *Rosenberg*, 237 F. Supp. 282 (S.D. Calif.).

Nor do the circumstances of this case support the claim of misconduct. It was perfectly natural for petitioner to apply for a waiver of the foreign-residence requirement upon advice of counsel; to concede at the hearing the truth of the factual allegations upon which the deportation order was based; and not to appeal the order. Petitioner had pending a private bill in Congress to give him permanent resident status.[4] Seeking a waiver of foreign residence was an administrative remedy that petitioner had to exhaust before the congressional committee could give favorable consideration to his private bill.[5] Rule 7,

[4] Introduction of a private bill in Congress to obtain for a non-immigrant alien the status of an immigrant lawfully admitted for permanent residence was itself *prima facie* evidence of petitioner's intention to abandon his foreign residence and thus violate his non-immigrant status. *Matter of A—*, 6 I & N Dec. 651 (Attorney General, 1956). Subject to the conditions that the alien may withdraw the private bill or depart voluntarily, the fact that the private bill is pending is sufficient ground to terminate exchange visitor status.

[5] Administrative denial of the application for a waiver of foreign residence as to petitioner, a medical specialist, was in accordance with the policy established by Congress to protect the purpose of the exchange visitor program. The pertinent House Report (No. 721, 87th Cong., 1st Sess.) states (p. 121):

> The subcommittee hereby *reiterates and stresses* the views expressed by its chairman (p. 84 et seq.) regarding the fundamental significance of *a most diligent and stringent enforcement of the 2-year foreign residence requirements* of Public Law 555 of the 84th Congress (subsec. (b) of sec. 201 of the United States Information and Educational Exchange Act of 1948, as amended).
>
> It is noted that by far the largest number of applications for waivers of the above-cited provisions of the law come *from nationals of countries who are in urgent need for expansion and improvement of their technological establishments and their health facilities.* It is believed to

Rules of Procedure, House Committee on the Judiciary, Subcommittee No. 1. His visitor status was in any event due by its own terms to lapse in three months and the deportation order was entered only thirteen days before the expiration date. Petitioner may also have been influenced by the fact that an outstanding order of deportation frequently aids in obtaining expeditious favorable congressional action. An appeal would only have delayed congressional consideration of the bill.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers *including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship.* * * * [Emphasis in original.]

Petitioner married his wife (also a Philippine exchange visitor) while in this country and they have two children born here (R. 71–72).

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